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No. 96-779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH F. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE, AND ORGANIZATION OF STATE BROADCASTING EXECUTIVES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici the Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), and the Organization of State Broadcasting Executives ("OSBE") collectively provide representation, programming, program distribution, related services, and financial support to the Nation's public television and radio stations -- two thirds of

which, like the petitioner in this case, are licensed to state or local government entities.[1]

APTS and PBS are nonprofit membership organizations whose members collectively include 175 licensees representing approximately 350 public television stations in all 50 states. OSBE is a membership organization composed of the chief executives of television and radio stations licensed to state and local government entities. CPB is a private, nonprofit corporation authorized by the Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-399, to allocate federal funds to promote public television and radio broadcasting in the United States. *Id.* at § 396.

As discussed in more detail below, the state-owned broadcast stations that amici represent and support are substantially and adversely affected by the Eighth Circuit's decision herein. The lower court's ruling limits sharply the ability of public broadcast stations to sponsor candidate debates that, in their good faith editorial judgment, will best serve the public interest. Not only does the decision affect the many stations bound by it, but the resulting conflict among the courts of appeals has given rise to uncertainty that will have a devastating effect on broadcaster decisions to televise debates in federal, state and local elections throughout the country. Amici therefore are directly affected by the Eighth Circuit's ruling and submit this brief to urge the Court to resolve the circuit conflict.

This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from the Eighth Circuit Court of Appeals' holding that a congressional candidate debate sponsored by the Arkansas Educational Television Commission ("AETC") to be aired on the Arkansas Educational Television Network

[1] Not all noncommercial broadcast stations are licensed to governmental bodies, but for purposes of reference herein, such stations generally will be labeled public broadcast stations.

("AETN")[2] is a "limited public forum" and that the First Amendment prohibits the Network's stations from making a good faith editorial decision to include in such debates only viable candidates whose participation will be of interest to the viewing public.

The facts are set forth fully in the Petition and will not be repeated here, except to point out that, under Arkansas law, a candidate needs only 2,000 petition signatures to secure a place on the congressional ballot. Ark. Code Ann. § 7-7-103(c)(1). It is undisputed in this case that, although Forbes attained ballot status, he had no campaign headquarters and no campaign staff, had raised little money, and had attracted no public support or media interest. Forbes Tr. Trans. 147-155, 172-173. At trial, the jury found in response to special interrogatories that the decision not to include Forbes in AETN's televised debate did not result from political pressure and was not motivated by disagreement with Forbes' views. *Forbes* v. *Arkansas Educ. Television Comm'n*, 93 F.3d 497, 501-502 (8th Cir. 1996) ("*Forbes II*").

Even the Court of Appeals agreed that AETC's judgment "was made in good faith" and involved "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 505. Nevertheless, the court characterized the exclusion of any candidate who attains ballot status as a bureaucratic "ipse dixit" and held that each "qualified" candidate potentially has a First Amendment right to compel access to debates on public broadcast stations. *Id.* at 504. Thus, state-owned television or radio stations may not sponsor a debate to inform the electorate about the major issues in such elections without inviting every candidate on the ballot to appear -- regardless of how little public interest some candidacies have generated, and regardless of how the resulting cacophony of voices would distract from the issues that are important to most voters.

[2] AETN is the public television network of the State of Arkansas and is dedicated to making the benefits of public television available to all the people of the State. AETN is governed by the AETC, an agency of the State of Arkansas.

SUMMARY OF ARGUMENT

The decision below is in direct conflict with the Eleventh Circuit's ruling in *Chandler* v. *Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990) (per curiam), *cert. denied*, 502 U.S. 816 (1991), where, on almost identical facts, the court held that a candidate debate on a public television station is not a public forum. *Forbes II* created this conflict by misreading and misapplying the public forum doctrine to encompass political debates on AETN.

Contrary to the Eighth Circuit's reasoning, the fact that "employees of the government" were involved in making an editorial decision has never been the *sine qua non* of public forum status, nor has the use of governmental property or funding been dispositive. A limited public forum does not exist simply because governmental property is compatible with communicative uses, or because some speakers have been permitted to use the property. Instead, the government must intend to open the forum for the benefit of speakers to disseminate their views without editorial oversight. Such intent does not exist where, as here, the presentation of political speech is part of a journalistic enterprise.

The Eighth Circuit's finding that these circumstances create public forum status will severely limit the ability of public stations to present debates and will undermine First Amendment values. The ease with which candidates may attain ballot status in many states means that debates open to all "legally qualified" candidates often will be, at best, unwieldy and uninformative, and, at worst, wholly unmanageable. Indeed, even in the brief period since the decision below, at least one public broadcast station faced with this impractical obligation has canceled a scheduled debate.

Even if this Court agrees with the Eighth Circuit that AETN's debate is a limited public forum, it should clarify that AETC's decision to invite only viable and newsworthy candidates was a reasonable exercise of journalistic judgment.

It is undisputed that AETC's decision to invite the major party candidates was not based on political favoritism or on disagreement with Forbes' views. Contrary to the decision in *Forbes II*, AETC's exercise of editorial judgment provides a far superior basis for deciding the composition of televised debates, just as the Eleventh Circuit held in *Chandler*. It is imperative that this Court review the *Forbes II* decision to prevent further confusion and to assure that broadcaster decisions to offer candidate debates for the viewing public are not chilled.

ARGUMENT

I. THE EIGHTH CIRCUIT'S HOLDING THAT A PUBLIC TELEVISION STATION'S CANDIDATE DEBATE IS A LIMITED PUBLIC FORUM CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND IS CONTRARY TO THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

a. *Forbes II*, the decision below, conflicts squarely with the Eleventh Circuit's holding in *Chandler*. On almost identical facts as the instant case, the *Chandler* court held that no public forum is created when a public television station hosts a candidate debate. 917 F.2d at 489. The Eleventh Circuit emphasized that treating candidate debates as public forums provides "no principled basis" for distinguishing between candidates and held that public broadcast stations must be free to decide whether to air debates, and which candidates to include. *Id.* Noting the ways in which public forum status would hobble journalistic judgment, the court found that "[t]he values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television." *Id.* at 490. Decisions by other circuits on the public forum doctrine also conflict with *Forbes II*.[3]

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[3] In *Muir* v. *Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023

The Eighth Circuit had previously agreed with the Eleventh Circuit's view. In *DeYoung* v. *Patten*, 898 F.2d 628 (8th Cir. 1990), the court held that a debate on Iowa Public Television was not a public forum and that a third party candidate could not raise a constitutional objection where the debate included only the two major party candidates. However, that decision subsequently was overruled by *Forbes* v. *Arkansas Educational Television Communication Network Foundation*, 22 F.3d 1423 (8th Cir.) (en banc), *cert. denied*, 115 S. Ct. 500 (1994), *and* 115 S. Ct. 1962 (1995) ("*Forbes I*"). In *Forbes II*, the Eighth Circuit held that candidate debates on state-owned television stations are limited public forums.[4] These divergent views of the public forum doctrine raise serious constitutional questions and provide a powerful reason for this Court to review the decision below.

b. Contrary to the Eighth Circuit's holding, a public television station's journalistic decision to present a debate between political candidates does not open a public forum for all candidates on the ballot to voice their opinions. The court of appeals concluded that "[t]he debate was surely a place opened by the government for a limited class of speakers,"

(1983), the full Fifth Circuit held that public television stations were not public forums and that viewers could not object to the cancellation of a scheduled program. In *Estiverne* v. *Louisiana State Bar Association*, 863 F.2d 371, 377 (5th Cir. 1989), the Fifth Circuit, following *Muir*, held that a state bar journal is not a public forum because the publication is not a passive conduit for speech, but instead requires the exercise of editorial discretion to perform its intended function. *See also Barnard* v. *Chamberlain*, 897 F.2d 1059, 1064-65 (10th Cir. 1990) (same); *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967) (law review at state university), *cert. denied*, 390 U.S. 920 (1968).

4 93 F.3d 497. In the wake of *Forbes II*, yet another panel of the Eighth Circuit held in a preliminary context (without discussion) that a public station's candidate debate was a public forum, but there upheld the broadcaster's selective invitation to "newsworthy" candidates to participate in the debate. *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137 (8th Cir. 1996) (denying injunction pending appeal), discussed *infra* at 17-19. The Eighth Circuit granted initial hearing en banc in *Marcus* on December 8, 1996.

which it found included all "candidates running for the Third District Congressional seat." 93 F.3d at 504. It characterized any exclusion of a legally qualified candidate by AETC as nothing more than "ipse dixit," even as it acknowledged that such editorial decisions involve "exactly the kind of journalistic judgment routinely made by newspeople" and that "the judgment in this case was made in good faith." *Id.* at 504-505. Ultimately, the court based its conclusion that AETN is a limited public forum on its own ipse dixit -- the "crucial fact" that "the people making this judgment were not ordinary journalists: they were employees of the government." *Id.* at 505. This reasoning has no basis in this Court's jurisprudence.

1. Under this Court's precedents, AETN's public nature does not make it, or its news programs, a public forum. This Court repeatedly has held that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2446 (1995) (plurality opinion). Nothing in the First Amendment compels "'access to property simply because it is owned or controlled by the government.'" *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (quoting *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). *See Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 301-302 (1974).

The Court recently confirmed that government ownership or control of a channel of communication is not dispositive of the public forum question. In *Lebron* v. *National Railroad Passenger Corp.*, 115 S. Ct. 961 (1995), the Court held that a government-controlled corporation is a state actor for purposes of First Amendment analysis. It compared Amtrak to the Corporation for Public Broadcasting, noting that the boards of directors of both entities are "controlled by Government appointees." *Id.* at 970. Nevertheless, control of the enterprise by "Government appointees" was not the

"crucial fact," as it was in *Forbes II*, 93 F.3d at 505, for the Court expressed no opinion as to whether a public forum had been created.[5]

2. This Court's rulings also confirm that AETN's function as a channel of communication does not make it a public forum. As with the billboard space at Pennsylvania Station, certain property controlled by the government may have *no other purpose* than the communication of ideas, *Lebron*, 69 F.3d at 653-654, but "[t]he mere physical characteristics of the property cannot dictate forum analysis." *United States* v. *Kokinda*, 497 U.S. 720, 727 (1990). If they did, as this Court has noted, "'display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician.'" *Id.* at 726 (quoting *Lehman*, 418 U.S. at 304).[6]

But this is not -- and has never been -- the law. "Not every instrumentality used for communication * * * is a traditional public forum or a public forum by designation." *Cornelius*, 473 U.S. at 803. Consequently, this Court has declined to accord forum status to advertising space on buses, *Lehman*, 418 U.S. at 301-302; mail boxes, *Greenburgh Civic Ass'ns*, 453 U.S. at 128-129; sidewalks adjacent to a post office, *Kokinda*, 497 U.S. at 730; charitable campaigns in federal offices, *Cornelius*, 473 U.S. at 803; and internal school mail systems, *Perry*, 460 U.S. at 49 n.9, even though all are avenues of communication controlled by the government, either by function or tradition. Most recently, this Court

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[5] 115 S. Ct. at 975. On remand, the Second Circuit held that the particular billboard at issue was a non-forum. *Lebron* v. *National R.R. Passenger Corp.*, 69 F.3d 650, *amended*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

[6] *See also Perry*, 460 U.S. at 49 n.9; *Greenburgh Civic Assn's*, 453 U.S. at 130 n.6 ("[A] bulletin board in the cafeteria at Fort Dix is specifically used for the communication of information and ideas, but such a bulletin board is no more a public forum than are the street corners and parking lots found not to be so at the same military base") (internal quotation marks omitted).

declined to hold that leased and public access channels on cable television systems are governed by the public forum doctrine. *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2385 (1996). And it is clear that public broadcasting stations, despite their communicative purpose, do not constitute designated public forums. *Muir*, 688 F.2d at 1040-41.

3. AETC's sponsorship of debates on AETN does not demonstrate any intention to open a public forum. The relevant question in a forum analysis is whether the decision by a public television station to present a debate between political candidates as part of its election year news programming constitutes opening the facility "for indiscriminate use" by political candidates. *Perry*, 460 U.S. at 47. Contrary to *Forbes II*, a sound reading of this Court's public forum cases compels the conclusion that the journalistic choices involved in sponsoring a debate do not create a forum by designation.

A "designated" or "limited" public forum is not created "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. *See also Perry*, 460 U.S. at 46-47. Such an intention cannot be inferred from the fact that the government permits some outside groups or individuals to use its channels of communication. "[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Cornelius*, 473 U.S. at 805. *See also Perry*, 460 U.S. at 47 ("[S]elective access does not transform government property into a public forum"). This Court has identified a variety of factors that illustrate the government's intention in this regard, including its practice and policy of allowing or disallowing unrestricted speech at a given location, the characteristics of the property, and, importantly, the government's stated intent. *Cornelius*, 473 U.S. at 802-803. Designation of government property as a public forum is not presumed, and the courts "will not find that a public forum has been created in the face of clear evidence of contrary intent." *Id.* at 803.

Analysis of the government's intent depends on the role it is performing in a particular case. When the State is not "'acting as lawmaker'" with the "'power to regulate or license,'" *Kokinda*, 497 U.S. at 725 (quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)), it is less likely to have intended to designate a public forum. Accordingly, where the government is acting in a "proprietary" rather than a "regulatory" role, courts have found that no forum has been designated. *See id.*; *Lehman*, 418 U.S. at 303-304; *Lebron*, 69 F.3d at 657. The same consideration applies in this case, where it is undisputed that AETC acted in a neutral journalistic role, rather than as a regulatory body. *See Estiverne*, 863 F.2d at 380.

With such considerations in mind, it should be clear that hosting a televised debate is not the same thing as opening a forum. The nature of the facilities at issue, station practices and policies associated with political campaign coverage, and the intention to sponsor debates as news events all underscore the fact that the requisite intention to open a public forum is absent. Broadcast stations, whether public or commercial, are not common carriers, traditionally open to all speakers.[7] Such facilities are not comparable to municipal auditoriums, which may -- or may not -- be opened as designated forums for the unfiltered speech of various speakers.[8] Rather,

[7] Section 3(h) of the Communications Act, 47 U.S.C. § 153(10), provides that broadcasters are not to be deemed common carriers, and this Court has made clear that there is no general right of access for purposes of political speech. *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 109 n.4 (1973) ("*CBS* v. *DNC*"). The same regulatory regime applies to public broadcast stations. *See FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Chandler*, 917 F.2d at 488; *Muir*, 688 F.2d at 1040. *See also City of New York Mun. Broad. Sys.*, 56 F.C.C.2d 169 (1975).

[8] *Compare Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (auditorium was dedicated for expressive activities) *with Calash* v. *City of Bridgeport*, 788 F.2d 80, 83-84 (2d Cir. 1986) (limited past access by selected groups to a municipal auditorium does not make the facility a limited public forum).

broadcast stations are licensed by the FCC in order to exercise "'the widest journalistic freedom consistent with [their] public [duties].'"[9]

More specifically, a broadcast station's decision to sponsor a political debate stems from this journalistic function, and not from a desire to provide an "open microphone" for a hypothetical class of beneficiaries. As the Eleventh Circuit found in *Chandler*, the Georgia Public Telecommunications Commission did not intend to open a public forum for all candidates when it sponsored debates for the offices of Governor and Lieutenant Governor. Rather, the public broadcasting commission was performing its function of "'providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia.'" *Chandler*, 917 F.2d at 488 (quoting Ga. Code Ann. § 20-13-5(a)).

The conclusion that hosting a debate is not the same thing as opening a public forum for all candidates is supported by the FCC's administration of the "equal opportunities" requirement of the Communications Act, 47 U.S.C. § 315. Section 315 obliges broadcasters to make their facilities available to all "legally qualified candidates" for a given office if they have allowed one such candidate to appear. This requirement does not apply, however, if the candidate's appearance is part of a bona fide newscast, news interview, news documentary, or on-the-spot coverage of a news event. *Id.* § 315(a)(1)-(4). Two decades of precedent interpreting the Communications Act confirm that the "common denominator" of broadcasters' decisions to sponsor debates, to determine their format, and to limit participation to selected candidates is "bona fide news value." *Henry Geller*, 95 F.C.C.2d 1236, 1244 (1983), *aff'd sub nom. League of Women Voters* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1984); *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429

[9] *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS* v. *DNC*, 412 U.S. at 110). This Court has expressly distinguished the editorial function of broadcasters from the access-based regime of common carrier regulation. *See League of Women Voters*, 468 U.S. at 378.

U.S. 890 (1976). Thus, under federal law, a decision to sponsor a debate and determine its participants is an exercise of news judgment, and not an indication of a broadcaster's intention to open its facilities to all legally qualified candidates.[10] The same analysis applies here.[11]

4. The public forum theory articulated by the Eighth Circuit below destroys the ability of public broadcast stations to act as independent journalistic organizations. This Court has noted that "editing is what editors are for; and editing is selection and choice of material." *CBS* v. *DNC*, 412 U.S. at 124. Any editorial decision "to broadcast one program excludes, for that time, all other programs." *Chandler*, 917 F.2d at 488. The editorial selection of who shall appear on particular programs is a journalistic choice of equal significance. Accordingly, this Court has noted that a right of access for political speakers would represent an "erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals, who are not." *CBS* v. *DNC*, 412 U.S. at 124.

It is important to recognize in this regard that the public forum principles articulated in *Forbes II* are not limited to

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[10] Most recently, the FCC granted exemptions from "equal opportunities" requirements to various broadcasting organizations, including PBS, to enable these entities selectively to provide time blocks to political candidates during the 1996 campaign. The PBS proposal enabled the "major part[y]" presidential candidates (selected by such criteria as polling results) to make unmoderated statements to the public on successive days during prime time hours. The Commission found that such presentations did not trigger equal opportunities requirements, which would have obliged PBS to open its facilities to all "legally qualified candidates," because the presentations were "bona fide news events" governed by "the good faith news judgment of PBS." *In re Requests of Fox Broad. Co., Pub. Broad. Serv., & Capital Cities/ABC, Inc.*, 11 FCC Rcd. 11,101, 11,102-03 (1996).

[11] It is undisputed that AETC intended its debates to be bona fide news programs within the meaning of Section 315(a).

publicly controlled broadcasting stations. The Eighth Circuit's holding creates a constitutional right of access to any state-owned or controlled publisher that allows citizens to communicate their views to the public. As the circuit court pointed out, it was immaterial that editorial selections were routine journalistic judgments made in good faith; the "crucial fact" was that the editors were state employees. *Forbes II*, 93 F.3d at 504-505. This holding, however, fails to grasp that sound editorial practices cannot coexist with a rule of law that imposes a constitutional right of access on behalf of all speakers in a particular class.

For this reason, other courts have routinely rejected claims that speakers have a First Amendment right to place articles or advertisements in state-run publications. *Barnard*, 897 F.2d 1059 (state bar newsletter); *Estiverne*, 863 F.2d 371 (same); *Sinn* v. *The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987) (advertisement in university newspaper); *Avins*, 385 F.2d 151 (law review at state university); *Leeds* v. *Meltz*, 898 F. Supp. 146 (E.D.N.Y. 1995), *aff'd*, 85 F.3d 51 (2d Cir. 1996) (advertisement in school newspaper); *Allston* v. *Lewis*, 480 F. Supp. 328 (D.S.C. 1979), *aff'd*, 688 F.2d 829 (4th Cir. 1982) (bar association newspaper). The principle at issue was amply set out by the Fifth Circuit in *Estiverne:*

> [T]he Louisiana State Bar Journal, as the trade publication of the Louisiana Bar, * * * serves a narrow, instrumental role. It was not established as an open forum for the expressive activities of the public, or of all members of the Bar. Rather, the invitation is to *submit* articles and advertisements for consideration by the editorial board, within the framework of editorial discretion necessary to fulfill the magazine's purposes. [863 F.2d at 381 (emphasis in the original).]

The court compared the bar journal to the public broadcast stations in *Muir* and concluded that the purpose of the publication "could not be accomplished without the exercise of editorial discretion." *Id.* at 380 n.12. If it is not reviewed by this Court, *Forbes II* will severely limit the exercise of

journalistic judgment by public stations, thus relegating them to second class status under the First Amendment compared to their private counterparts.

II. THE EIGHTH CIRCUIT'S RULING WILL RESTRICT THE ABILITY OF PUBLIC TELEVISION STATIONS TO PROVIDE CAMPAIGN COVERAGE, THUS UNDERMINING THE CORE PURPOSE OF THE FIRST AMENDMENT

Consistent with their public service mission and journalistic responsibilities, public television and radio stations frequently sponsor and broadcast debates between candidates for local, state, and national office. For purposes of this brief, amici surveyed member stations and determined that public broadcasters sponsored and telecast well over three hundred debates in 1996. If, as the court below ruled, public broadcast stations always must invite all qualified candidates without regard to sound editorial judgment, there will be a flood of candidates, each claiming a constitutional right of access. This glut of candidates often will make such programs impractical to produce and inevitably will cause public stations to curtail debates. Thus, the Eighth Circuit's expansion of the public forum doctrine ironically will produce less speech and less public debate on campaign issues -- precisely the opposite of the effect intended by that court. It also is a result contrary to the central purpose of the First Amendment.

This problem is far from speculative. Candidates for offices at all levels abound, and it is a simple matter to attain ballot status in many states.[12] In Tennessee, a candidate need

[12] Thus, a candidate often may attain ballot status with a relatively small number of petition signatures by registered voters. For typical examples, see Idaho Code § 34-626(a), (b) (500 House, 1,000 Senate); Iowa Code Ann. § 45.1(1), (2) (300 House, 1,500 Senate); Ky. Rev. St. Ann. § 118.315(2) (400 House, 5,000 Senate); Miss. Code Ann. § 23-15-359(1)(a), (c) (200 House, 1,000 Senate); N.D. Cent. Code § 16.1-12-02(a), (b) (300 House, 1,000 Senate); N.J. Stat. Ann. § 19:13-5 (100 House, 800 Senate); R.I. Gen. Laws § 17-14-7(a), (b) (500 House, 1,000 Senate); Utah Code Ann. § 20A-9-502 (2)(a)(i), (ii) (100 House, 300 Senate).

obtain only *25 signatures* to appear on the ballot as a candidate for the U.S. House or Senate, Tenn. Code Ann. § 2-5-101(b)(1), and in Oklahoma, a candidate need not obtain any signatures at all, but may appear on the ballot after payment of a modest fee.[13] Not surprisingly, in 1996 eleven candidates for the U.S. House of Representatives appeared on the ballot in one Tennessee district (as well as in a Texas district).[14] Additionally, the Federal Election Commission has reported that 23 presidential candidates appeared on state ballots in the 1992 election cycle, and 21 candidates appeared on ballots in 1996.[15]

Congress determined long ago that an absolute statutory right of candidate access to news programs under the Communications Act "'would tend to dry up meaningful radio and television coverage of political campaigns.'" *Chisholm*, 538 F.2d at 352 (quoting S. Rep. No. 86-562 at 10 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2564, 2572). Congress amended Section 315 of the Act to exempt bona fide news

[13] In Oklahoma, a candidate may appear on the ballot simply by making payments, respectively, of $750 (House) or $1,000 (Senate). Okla. Stat. Ann. tit. 26, § 5-112.

[14] *See 1996 Election Results*, 54 Congressional Quarterly Weekly Report 3250, 3256-57 (1996). Indeed, ballots containing between 6 and 11 names in congressional and gubernatorial races were not uncommon. For example, in addition to the Tennessee and Texas races described in the text, 9 individuals qualified for the ballot in the New Jersey Senate race; 7 for the Tennessee Senate race and the Vermont gubernatorial race; and 6 for senatorial and congressional races in California, Illinois, Iowa, Massachusetts, Michigan, Mississippi, New Jersey, Oregon, and Tennessee. *Id.* at 3250-57.

[15] *See In re Requests of Fox*, 11 FCC Rcd. at 11,105 n.10; Federal Election Commission, *1996 Presidential Candidates on the General Election Ballots of Each State and the District of Columbia* (Oct. 18, 1996) <http://www.fec.gov/96fsd/pballots.htm>. *See generally* Peter Maass, *What Makes John Doe Run?*, Wash. Post, Oct. 19, 1996, at D1.

coverage after finding that enforcement of a "rigid" access requirement would deter broadcasters from covering political campaigns, for to do so would "'assume the burden of presenting a parade of aspirants.'" *Id.* at 352 n.5 (quoting S. Rep. No. 86-562 at 9, 1959 U.S.C.C.A.N. at 2571). As the expert agency entrusted with interpreting the Section 315 amendments, the FCC repeatedly has expanded the news exemption to enable broadcasters to host debates and expand political coverage. [16] These decisions were premised on the assumption that a rigid right of access for all candidates would limit the number of debates. The same considerations apply to candidates' assertions that the First Amendment provides a right of access to broadcast stations. *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417, 430-432 (D.C. Cir. 1980).

Any contrary holding subverts the First Amendment. Last August, for example, just after the *Forbes II* decision, the Nebraska Educational Telecommunications Network canceled a scheduled debate between the major party contenders for the United States Senate due to access demands by less newsworthy candidates. [17] The same phenomenon will no doubt occur on a far broader scale if the Eighth Circuit's anomalous decision evades this Court's review.

III. THIS COURT SHOULD CLARIFY THAT PUBLIC BROADCAST STATIONS MAY MAKE REASONABLE JOURNALISTIC CHOICES IN PRESENTING CANDIDATE DEBATES EVEN IF DEBATES ARE CONSIDERED LIMITED PUBLIC FORUMS

Even if this Court agrees with the Eighth Circuit that AETN's congressional debate is a limited public forum, it

16 *See Aspen Inst.*, 55 F.C.C.2d 697 (1975), *aff'd sub nom. Chisholm*, 538 F.2d 349; *Henry Geller*, 95 F.C.C.2d 1236.

17 *See* Don Walton, *Senate Debate at Fair Canceled*, Lincoln Journal Star, Aug. 24, 1996 at 1A; *Name on Ballot Not Enough to Qualify For Political Debate* (editorial), Lincoln Journal Star, Aug. 27, 1996, at 4B.

should clarify that AETC's editorial decision to invite only newsworthy candidates as measured by their viability was a permissible journalistic judgment. The subsequent *Marcus* decision by a panel of the Eighth Circuit illustrates this point. There, the court found that public broadcasters may limit debate invitations to certain candidates because "newsworthiness is peculiarly a decision within the domain of journalists," and that Iowa Public Television had "a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates." *Marcus*, 97 F.3d at 1142, 1144. The same findings apply fully to AETC.

In establishing its congressional debate, AETC was serving precisely the same "compelling interest" as was found in *Marcus*. Like the Iowa public stations, AETC operates as "a government agency which is also a media organ." *Id.* at 1142. Both state entities are journalistic enterprises that, "[b]y [their] nature and under controlling policies * * * *must* be concerned with the newsworthiness of the issues and speakers included in [their] programming." *Id.* (emphasis in original). Both are governed by the Statement of Principles of Editorial Integrity in Public Broadcasting, and both established programming policy statements under which editorial judgments were made regarding news and campaign coverage. *Id.* at 1142-43; Pet. App. 64a, 82a, 96a; Tr. Trans. 186-197.

Although the application of these journalistic principles was characterized in *Forbes II* as relating only to the "viability" of candidates, the discussion in *Marcus* made clear that the identical factors determined a candidate's "newsworthiness." *Compare Marcus*, 97 F.3d at 1143-44 (describing factors in news judgment, such as whether candidate had shown "success at the polls," was attracting crowds and news coverage, was successfully raising funds, was attracting campaign volunteers, etc.) *with Forbes II*, Tr. Trans. at 147-155, 172-173 (AETC's news judgment turned on Forbes' inability to generate public support or media coverage, his lack of campaign staff, headquarters, or contributions, and his inability to draw crowds). *See also Marcus*, 97 F.3d at 1144

(Beam, J., dissenting) (describing *Forbes II* and *Marcus* as "two peas from the same analytical pod" and characterizing the respective editorial decisions as "indistinguishable").[18]

The Eleventh Circuit in *Chandler* stressed that such journalistic judgments provide the only sound basis for deciding which candidates should appear on public stations' televised debates. The court noted:

> A decision to air the debate between the two front runners, or the three who will appear on the ballot, or others, is appropriately made by the programmers undertaking to provide an educational program of sufficient interest to attract viewers. [917 F.2d at 489.]

The *Chandler* court foretold that a ruling requiring candidates' access on public stations would have "no principled basis" for distinguishing between candidates in the selected class. *Id.*

The *Forbes II* decision vividly demonstrates the lack of intelligible standards predicted in *Chandler*, especially when considered in light of the subsequent *Marcus* ruling. The *Forbes II* court initially defined the class of speakers qualifying for a right of access as including "legally qualified candidates." 93 F.3d at 504. *See also id.* ("gather[ing] enough signatures to appear on the ballot" gives any candidate "equal status with the Republican nominee and the Democratic nominee"). It further noted the political success of write-in candidates and stated that whether a candidate is viable "ultimately [is] a judgment to be made by the people of the Third Congressional District." *Id.* at 504-505. Nevertheless, evidently to prove its point that "[p]olitical viability is a tricky concept," *id.* at 505, the court subsequently modified its holding to exclude certain debates

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[18] Once again, the FCC has based its finding of bona fide news judgment on the same factors. *See, e.g., In re Requests of Fox*, 11 FCC Rcd. at 11,102-03. *See also id.* at 11,105 (noting that 20 presidential candidates cumulatively received less than one percent of the popular vote in 1992).

("organized by people or groups other than the defendants") and specified candidates ("write-in candidates"). *See Forbes v. AETN*, No. 95-2722 WAFS (Sept. 26, 1996) (denying motion to stay mandate).

The journalistic judgments relied upon in both *Chandler* and *Marcus* provide a far more solid basis for deciding which candidates should be included in candidate debates on public television stations than does the holding in *Forbes II* that sweeps in some poorly defined subset of legally qualified candidates. Review by this Court is all the more pressing here, in the wake of *Marcus*, since the difference between a compulsory right of access for some candidates and exclusion can turn on how public broadcasters (or a reviewing court) *characterize* their sound journalistic decisions.

This issue must be clarified before it leads to a litigation boomlet in which courts are called upon to dissect the particular wording of editorial decisions that, in substance, are identical. As the *Marcus* court observed, "professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges." 97 F.3d at 1144.

Unless *Forbes II* is corrected, the inevitable consequence will be to place such decisions in the hands of judges and to disrupt and curtail the presentation of televised debates. It is important to recall that, in *Chandler*, the district court initially issued a temporary restraining order blocking a televised debate between the Democratic and Republican candidates for Governor because it did not include a third party challenger. Fortunately, the lower court decision to treat public television stations as public forums was reversed by the Eleventh Circuit and the TRO vacated. *Chandler*, 917 F.2d at 490. Such disruptions of the democratic process will become commonplace unless this Court resolves the confusion created by *Forbes II*.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, amici respectfully urge this Court to grant the Petition for a Writ of Certiorari.

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